

INTRODUCTORY NOTES

(1) Statutory Authority. The statutory authority for discrimination claims is as follows: Equal Pay Act, 29 U.S.C. § 206(d) (2001) (prohibiting sex-based pay differentials); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2001) (age); Civil Rights Act of 1866, 42 U.S.C. § 1981 (2001) (prohibiting racial discrimination in the making and enforcement of contracts); Civil Rights Act of 1871, 42 U.S.C. § 1983 (2001) (prohibiting state action in violation of federal civil rights); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2001) (race, color, religion, national origin, or sex discrimination and sexual harassment); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2001) (pregnancy); Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2001) (disability); Rehabilitation Act of 1973, 29 U.S.C. § 794 (2001). The statutory authority for retaliation claims is as follows: 29 U.S.C. § 626(d) (2001) (ADEA retaliation provision); 42 U.S.C. § 2000e-3(a) (2001) (Title VII retaliation provision); 42 U.S.C. § 12203(a) (2001) (ADA retaliation provision). See also Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 n.9 (1st Cir. 1996) (Title VII retaliation) (Stahl, J.) (Title VII and ADEA retaliation analysis is “largely interchangeable”); see also Champagne v. Servistar Corp., 138 F.3d 7, 13 (1st Cir. 1998) (ADA retaliation claim) (Lynch, J.) (citing Mesnick v. General Elec. Co., 950 F.2d 816 (1st Cir. 1991) (ADEA retaliation claim) (Selya, J.)).

(2) Disparate Treatment Cases. We have drafted generic instructions that should generally be usable, with appropriate modifications, for federal employment discrimination claims where the plaintiff claims disparate treatment based on race, color, religion, sex, national origin or age, but we have drafted separate instructions for harassment, retaliation, Equal Pay Act and disability discrimination claims. See, e.g., Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) (Title VII) (Selya, J.) (“We regard Title VII, ADEA, ERISA and FLSA as standing in *pari pasu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive of decisions involving another.”); Equal Employment Opportunity Comm’n v. Amego, Inc., 110 F.3d 135, 145 n.7 (1st Cir. 1997) (ADA) (Lynch, J.) (“The ADA is interpreted in a manner similar to Title VII, and courts have frequently invoked the familiar burden-shifting analysis of McDonnell-Douglas in ADA cases.” (citations omitted)); Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 428 n.3 (1st Cir. 2000) (ADEA) (Lynch, J.) (“This [Title VII McDonnell Douglas] framework applies to Age Discrimination in Employment Act (ADEA) cases under the law of this Circuit.”); Ayala-Gerena v. Bristol Meyers-Squibb Co., 95 F.3d 86, 95 (1st Cir. 1996) (Section 1981) (Torruella, C.J.) (“In order to prevail under Section 1981, a plaintiff must prove purposeful employment discrimination . . . under the by-now familiar analytical framework used in disparate treatment cases under Title VII.”); White v. Vathally, 732 F.2d 1037, 1039 (1st Cir. 1984) (Title VII and section 1983) (Bownes, J.) (“[W]e have recognized that the analytical framework for proving discriminatory treatment claims set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973), is equally applicable to constitutional and to Title VII claims.” (parallel citations omitted)); Kvorjak v. Maine, 259 F.3d 48, 50 n.1 (1st Cir. 2001) (ADA) (Coffin, J.) (“the standards applicable to [the American’s with Disabilities Act and the Rehabilitation Act] have been viewed as essentially the same”).

(3) Disparate Impact Cases. These instructions are not designed for use in disparate impact cases.

(4) 1991 Civil Rights Act Partial Relief. The First Circuit has said that there is “some dispute” as to whether the 1991 Civil Rights Act provisions allowing for partial relief in mixed motive cases should be applied in McDonnell Douglas pretext cases or “outside of the Title VII context.” Dominguez-Cruz, 202 F.3d at 429 n.4. Judge Lynch cited Justice Souter’s dissent in St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 542 (1993) (Title VII), and a dissent by Judge Stahl in Carey v. Mt. Desert Island Hospital, 156 F.3d 31, 44 (1st Cir. 1998) (Title VII), for the proposition that the 1991 amendment might not be applicable to a McDonnell Douglas pretext case. Dominguez-Cruz, 202 F.3d at 429 n.4. The court also cited Tanca v. Nordberg, 98 F.3d 680, 682-85 (1st Cir. 1996) (Title VII retaliation) (Torruella, C.J.), where it held that the 1991 amendment does not apply to mixed motive retaliation claims. Dominguez-Cruz, 202 F.3d at 429 n.4. As for ADEA cases, the court cited 8 Lex K. Larson, Employment Discrimination, § 136.05, at 136-13 (2d ed. 1999), for cases holding that it does not apply to an ADEA case. Dominguez-Cruz, 202 F.3d at 429 n.4. More recently the First Circuit has stated explicitly that partial relief is not available under the ADEA. Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 33 (1st Cir. 2001) (ADEA) (Boudin, C.J.). As for ADA cases, “[t]his circuit has noted, but not resolved, the question” Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21, 25 n.2 (1st Cir. 2002). Although not discussed in any of these cases, section 1981 and section 1983 claims might also be excluded from the reach of this aspect of the 1991 amendment for the same reasons.

(5) Individual Liability. Although the First Circuit has not yet decided the issue, other circuit and several district courts within the First Circuit have concluded that federal employment discrimination statutes (e.g., Title VII, ADA, ADEA and other statutes that prohibit discrimination by “employers”) do not authorize suits against individuals who have discriminated or harassed. See Acevedo Lopez v. Police Dep’t of P.R., 247 F.3d 26, 29 (1st Cir. 2001) (ADA) (Lipez, J.) (“We simply note that we have not resolved the question of whether personal capacity suits can be sustained under the ADA. However several other circuit courts and three district courts within this circuit have held that individuals are not subject to suit under the ADA.” (internal quotations omitted) (collecting cases)); see also Quiron v. L.N. Violette Co., 897 F. Supp. 18, 19-21 & n.2 (D. Me. 1995) (ADA and ADEA) (Brody, J.) (collecting cases); see generally Henry P. Ting, Note, Who’s the Boss?: Personal Liability Under Title VII and the ADEA, 5 Cornell J.L. & Pub. Pol’y 515 (1996). Sections 1981 and 1983 do not use the same “employer” language and therefore do not share this restriction on individual liability.

(6) Respondeat Superior in 42 U.S.C. §§ 1981 and 1983 Cases. Section 1983 does not allow recovery on respondeat superior theories of liability. See Voutour v. Vitale, 761 F.2d 812, 819 (1st Cir. 1985) (section 1983) (Per Curiam) (“The Supreme Court has firmly rejected respondeat superior as a basis for section 1983 liability of supervisory officials or municipalities.” (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 691, 694 n.58 (1978) (section 1983) (Brennan, J.))); see also Aponte Matos v. Toledo Davila, 135 F.3d 182, 192 (1st Cir. 1998) (section 1983) (Lynch, J.) (“Supervisory liability under § 1983 ‘cannot be predicated on a respondeat superior theory, but only on the basis of the supervisor’s own acts or omissions.’”).

The availability of respondeat superior liability in section 1981 cases depends on the identity of the defendant. Because the remedial provisions of section 1983 “provide[] the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor,” Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 731-32 (1989) (sections 1981 and 1983) (O’Connor, J.), there is no respondeat superior liability in section 1981 cases involving governmental defendants. Section 1981 cases against non-governmental defendants, on the other hand, are not governed by the section 1983 remedial provisions, and therefore respondeat superior theories of liability are available. See Springer v. Seaman, 821 F.2d 871, 881 (1st Cir. 1987) (section 1981) (Rosenn, J.) (“Unlike § 1983, § 1981 contains no limitation to actions taken under color of state law, and its legislative history evidences no intention to reject the ordinarily applicable respondeat superior liability or to impose the strict causation requirements of § 1983.”), abrogated in part by Jett, 491 U.S. at 731-32 (although section 1983 provides the exclusive remedy for section 1981 cases against state actors, section 1981 claims against private actors are not governed by section 1983 rules); see also Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1262-64 (10th Cir. 1995) (section 1981) (Kelly, J.) (analyzing section 1981 defendant’s liability under respondeat superior theory); Cabrera v. Jakobovitz, 24 F.3d 372, 385-88 (2d Cir. 1994) (section 1981) (Newman, C.J.) (same).

For a discussion of the substantive standards that apply in section 1983 supervisory liability cases, see Excessive Force Instruction 1.1 note 3.